# THE ENVIRONMENTAL ASSESSMENT BOARD

## THE HEARING PROCESS:
## DISCUSSION PAPERS ON PROCEDURAL AND LEGISLATIVE CHANGE

*September, 1990*

Environmental Assessment Board
Commission des évaluations environnementales

90-06738/

Office of the Chair

Bureau du Président

2300 Yonge Street
P.O. Box 2382
Suite 1201
Toronto, Ontario
M4P 1E4
416/323-4806

2300, rue Yonge
C.P. 2382
Bureau 1201
Toronto (Ontario)
M4P 1E4
416/323-4806

Fax: 416/323-4997

September 7, 1990

Dear Sir or Madam:

**Re: Proposed Changes to the Hearing Process**

Much attention has been given to problems with the Environmental Assessment process, including the hearings component. The government has established a task force to revamp the administrative and legislative elements of the process. The Board is convinced that this is also an appropriate time for it to attempt to improve the hearing process, especially in light of the lengthy hearings now underway and those still to come.

The attached discussion papers identify various problems and suggest possible solutions. The objective of preparing these papers and distributing them to interested members of the public is to have a full debate on how the Board's hearings can be made shorter and more efficient, while remaining fair to all participants.

As the preamble to these discussion papers notes, the Board recognizes that there may be other or additional options which have not been canvassed; we welcome discussion on additional innovative ideas as well as the proposals set out in the discussion papers.

We are seeking written comment by October 15, 1990. Once we have had an opportunity to review the responses, we will be inviting a representative group of commentators to attend a Round Table discussion in mid to late November, 1990. The Board will then consider what changes it would like to implement, and will recommend any necessary legislative changes to the task force and the government. Changes to the Board's Rules of Practice and Procedure will also be proposed.

We look forward to receiving your comments, and hope that we can arrive at changes which will achieve time and cost savings while at the same time enhancing the hearing process.

Yours very truly,

Grace Patterson
Chair

## DISCUSSION PAPERS


| | | Page No. |
|---|---|---|
| 1. | Preamble | 1 |
| 2. | Requirement for Meetings of Expert Witnesses without Counsel | 3 |
| 3. | Meetings of Parties for the Purpose of Preparing a Statement of Agreed Facts and a List of Outstanding Issues | 6 |
| 4. | Pre-Hearing Mediation and Conciliation by Board Members or Staff | 9 |
| 5. | Use of Pre-filed Evidence | 12 |
| 6. | Motions for "Non-Suit"/Early Dismissal of Applications | 14 |
| 7. | Alternative Means of Examination of Expert Envidence | 16 |
| 8. | Imposition of Time Limits for the Presentation of Oral Evidence | 19 |
| 9. | Relegation of Procedural and Other Non-evidentiary Matters to to Consideration Outside the Actual Hearing Hours | 22 |
| 10. | Timing of Fairness Challenges | 24 |
| 11. | Contempt Powers | 26 |
| 12. | Use of Board Counsel and/or Technical Staff and Definition of Their Roles | 28 |
| 13. | Use of Costs Powers as a Penalty | 32 |

## PREAMBLE

The Environmental Assessment Board wants to improve it procedures. The Board believes that it would be beneficial to have comments from members of the public who are, or may be, involved in the Board's proceedings, with respect to procedural changes that are being considered. To this end, the Board has developed a series of Discussion Papers to stimulate debate and in the hope of receiving responses which will be helpful in its deliberations.

The Environmental Assessment Act was designed to ensure that the possible environmental effects of major undertakings would be fully and fairly evaluated in a public forum before the undertaking was approved. The Act sets out a detailed and explicit planning process which proponents must pursue to ensure that the purpose of the Act is fulfilled. However, the requirements of the legislation have often led to a lengthy and costly environmental assessment approvals process. Individual panels of the Board have initiated procedures to streamline the hearings but these procedures have met with varying levels of acceptance and success.

The Board conducts its hearings as quasi-judicial proceedings, using an adversarial system and adopting many of the rules of the courts for the presentation and testing of evidence. However, the Board also has an inquisitory role in fulfilling its obligations to ensure that the public interest is protected and this inquisitory role requires rules and procedures that differ from the court rules in many respects. The Board believes procedural changes may be necessary to enhance the opportunity for more effective and efficient public participation.

These Discussion Papers do not reflect a consensus of the Board members nor do they reflect any policy decisions taken by the Board. Rather, the Papers describe problems that have been identified and possible solutions to those problems. The Board wishes to stimulate as wide a range of discussion as possible regarding how the Board, within its mandate, might expedite hearings while providing a forum that is fair to all participants. Indeed, the Board is convinced that the hearing process must become more efficient if it is to remain accessible to all of the interests that should be represented.

Therefore, your comments and thoughtful suggestions are invited.

Responses need not be confined to the proposals put forward in the Discussion Papers. The Board invites and encourages respondents to raise and comment on any other process issues they believe would improve the effectiveness of hearing procedures. Other topics for discussion might include: the principles and criteria to be considered by the Board in deciding on costs awards; public consultation requirements; the possibility of establishing generic guidelines for specific types of applications (e.g. landfill sites); and the possibility of establishing, by legislation, limits to the duration of each Board hearing.

Complex problems require creative solutions and a spirit of co-operation to achieve a common goal, an environmental assessment hearing process that meets the needs of the people of Ontario.

## REQUIREMENT FOR MEETINGS OF EXPERT WITNESSES WITHOUT COUNSEL

### 1. Background

The technical nature of the Board's hearings generally necessitates the calling of expert witnesses. Each party, for example, might have a hydrogeologist, and each hydrogeologist will be cross-examined by each party's counsel. In many cases, this means extensive cross-examination on a whole range of issues, some of which are extremely technical and not of interest to the Board unless it is established that proper procedures were not followed, etc.

The lawyers' lack of expertise in these technical fields means that they are often reliant on their own experts in the same field to assess the answers given during cross-examination. The battle of the experts is fought using counsel as the spokesperson.

The counsel's interest is normally broader than that of the expert. He/she should be concerned about the client's position with respect to the application, and will not want to jeopardize the client's position in any way.

### 2. The Proposal

The technical experts could meet among themselves before reports are finalized in an attempt to arrive at some understanding of what they agree with and what is in contention. Their positions should be based on technical rather than adversarial considerations. Discussion of the background information supporting the conclusions of the applicant's expert could be pursued in this forum and admitted as true if the other experts were satisfied with the methods by which it was gathered, the interpretation placed upon it, and the purposes for which it was used.

The result of an agreement among experts should shorten cross-examination substantially, and emphasize for the Board what the technical issues are.

Before the experts' conclusions are placed before the Board, counsel would be allowed to review with his/her expert the contents of the agreement, and to reject any agreement if it seemed prejudicial to the client's interest. Thus the discussions among experts would be characterized as 'without prejudice' until counsel or the parties had agreed to the

statement which would be placed before the Board. An alternative to this option would be to require a binding agreement between experts which would not need to be ratified by counsel, since presumably the experts inform counsel of the important technical issues.

The Law Society Rules require that a lawyer acting in a proceeding not mislead the tribunal. It should be evident, therefore, that in Board hearings where the experts have agreed on something which counsel or a party does not want to have disclosed, questioning and argument should not be inconsistent with that agreement.

## 3. Possible Amendments to Legislation or the Board's Rules

a) Statutory Powers Procedure Act

Section 10 of the SPPA states that a party to proceedings may at a hearing,

(b) call and examine witnesses and present his arguments and submissions;

(c) conduct cross-examinations of witnesses at a hearing reasonably required for a full and fair disclosure of the facts in relation to which they have given evidence.

This section could be amended to provide for limits on cross-examination where that cross-examination is inconsistent with an agreement reached among expert witnesses, and where cross-examination is not needed on specific issues because of the agreement reached.

b) Environmental Assessment Board Rules

Section 20 of the Rules provides the purposes for which preliminary hearings may be held. One additional identified purpose might be to "arrange for meetings between expert witnesses dealing with the same subject matter (without counsel) in order to arrive at a statement in which the issues in contention are identified and stated in writing, after review by counsel, for use by the Board." This suggestion is based on the premise that counsel will review any agreement before it is presented to the Board.

Also, under the "Expert Witnesses" heading in Part II of the Rules, a section might be added which would state that expert witnesses dealing with the same subject matter may be required to meet with each other, in the absence of counsel, in order to define the technical issues in contention.

In the same part of the rules, a provision on cross-examination could restrict cross-examination to the issues in contention as defined by agreement among experts and ratified by counsel, with the additional requirement that if a particular matter did not appear in the statement but had been agreed upon by the experts, cross-examination which would lead to a conclusion different than that in the agreement could not be advanced.

## MEETINGS OF PARTIES FOR THE PURPOSE OF PREPARING A STATEMENT OF AGREED FACTS AND A LIST OF OUTSTANDING ISSUES

### 1. Background

This requirement should be considered in conjunction with meetings of expert witnesses prior to the presentation of evidence. Rather than having the parties merely state broadly their concerns and issues at the preliminary hearing and again at the main hearing, parties could help to delineate the issues for each other as well as for the Board.

The Timber Management hearing panel now has some experience with parties listing issues (i.e. "scoping") with respect to witness panels and specific areas of evidence. The intention is to help the panel to concentrate on the issues which are most important, and to lessen the time taken for oral evidence because the Board knows what is at issue. The parties are supposed to deal with identified issues during oral evidence rather than with all potential issues.

At other hearings, specifically the Maidstone Landfill hearing and the ENSCO PCB Mobile Destruction Facility hearing, the parties negotiated throughout the hearing with respect to conditions. Out of this exercise, outstanding issues emerged more clearly. This experience shows that meetings among parties or their experts should occur not only prior to commencement of the hearing of evidence, but also at intervals throughout the hearing. This may not lead to an earlier decision date, but it will cut down on public hearing costs because some of the discussion will occur among parties without the Board and the court reporter being in attendance.

The civil courts require the parties to commit themselves to the issues to be raised and disputed at the beginning of the proceeding in "pleadings". The plaintiff files a Statement of Claim which contains in brief the facts (not the evidence supporting the facts), as well as the specific orders requested. The Statement of Defence and Reply must be specific about the denials and the facts supporting same. The plaintiff files a Reply if there are new points raised in the Statement of Defence. If a party later in the proceeding wishes to proceed with any other issues or facts, an order granting leave to amend must be sought.

Rule 51 of the court rules deals with Admissions of facts. It sets a time limit of 20 days within which the party being requested to admit the truth of a fact must respond. The court may award costs against a party that denies or refuses to admit a fact or document that is subsequently proved at a hearing.

## 2. The Proposal

Parties or their counsel should meet prior to the hearing of evidence, and after technical experts have met, to delineate and provide to the Board a statement of agreed facts and a list of matters at issue.

In order to make this a useful exercise, and to provide some incentive to agree on certain matters, a party should be able to issue a "request to admit" to an opposing party. During the hearing counsel and experts should meet to further delineate issues and discuss potential conditions. The determination of when these meetings might take place would not necessarily be standardized, but would depend upon the circumstances of each case. If the hearing were phased according to subject matter, meetings might take place prior to each new area of evidence. If the hearing proceeded party by party, the meetings might occur prior to the presentation of each new area of evidence presented by the applicant.

Although the Board does not wish to formalize its process to the extent that the Courts have, the Board and the parties must know, at the outset of the hearing, the issues or matters in dispute.

## 3. Possible Amendments to Legislation or the Board's Rules

a) Statutory Powers Procedure Act

Section 10 of the SPPA contains the general provisions respecting examination and cross-examination. This section could provide for the restriction of cross-examination where facts have been agreed upon, and in situations where the cross-examination was not within the ambit of the identified issues.

b) Environmental Assessment Board Rules

Rule 20(2) with respect to preliminary hearings says that "issues raised at preliminary hearings may be determined by a Board order". This is confusing when considered in light of the discussion of agreed facts and lists of issues, and therefore should be amended to reflect that when procedural matters are brought to the Board's attention at a preliminary hearing, the Board may communicate its decision with respect to these in a Board order. With respect to the enumeration of what issues are important for determination at the hearing, Rule 20(1)(b) could be expanded to say that the preliminary hearing is for the purpose of defining the issues in dispute as well as developing an ongoing process for issue identification and resolution during the course of the hearing.

Rule 49, which deals with the role of Board counsel, might be expanded to provide that counsel for the Board may act as a facilitator to secure agreement among parties on facts not in contention and issues in contention.

Rule 50(4) states that parties should, at the time of delivering argument, make known to the Board any terms and conditions they would like the Board to attach to any approval. This might be amended to provide that terms and conditions may be presented at any time acceptable to the Board in order that evidence can be adduced to deal directly with suggested conditions.

A new rule comparable to Rule 51 of the Rules of Civil Procedure should be added to the Board's rules in order to provide a "request to admit" procedure.

## PRE-HEARING MEDIATION AND CONCILIATION BY BOARD MEMBERS OR STAFF

### 1. Background

The Board views mediation as a mechanism capable of bringing the parties to a dispute closer together and wishes to use it to settle aspects of a dispute, including procedural matters, coming before the Board. Mediation might be accomplished by either a Board member or an outside mediator.

Macaulay[1] thinks that more agencies should make use of conciliation and mediation procedures. He states:

> "At the very least, the dispute can be eased and processed through conciliation, enabling the parties to find their own solutions; or through mediation, providing the disputants with a solution which they may or may not adopt." (Page 9-20)

He suggests that new legislation will be required for an agency which would provide common conciliation and mediation services to a number of agencies. A particular mediator would report to the agency that used its services. The agency would then review the recommendation and approve it, send it back for further study, or send it on for a hearing.

Of particular interest to the Board is the fact that matters at issue between two or more parties often involve a broader public interest which must be taken into account. In these circumstances, Macaulay recommends that the proposed agreement must be put to the agency for confirmation in order that it can decide whether the public interest has been adequately protected. He suggests that in cases where a public hearing is still required, the agency may give interim confirmation to a proposed settlement pending final confirmation after a public hearing.

The pre-trial conference in civil procedure has been used for approximately 15 years in Ontario, and is generally recognized to be a very powerful tool in settling cases or

---

[1] Robert Macaulay. "Review of Ontario's Regulatory Agencies". September, 1989.

narrowing the issues. It is estimated that more than 50% of cases pre-tried settle thereafter.

Mediation has also been used for some time in the family law field.[2] Mediation can be open or closed. Closed mediation with a Judge present is in effect the pre-trial conference concept. The reason that mediation with a Judge seems to have greater impact is that the Judge (or Board member) can give an informed prediction to the parties of what will probably be the outcome at hearing. It takes a brave party to press forward in the face of a negative forecast from an informed, experienced and respected Judge.

## 2. The Proposal

The Board should seek specific authorization in either its legislation or a separate piece of legislation allowing mediation and conciliation and describing the role of each.

## 3. Possible Amendments to Legislation or the Board's Rules

The following are provisions set out in Macaulay's report dealing with mediation and conciliation. They might be included in the EAA (if adopted for use in s.18) or in separate legislation.

1. An agency may on its own initiative, or at the request of the parties to proceedings, convene a meeting of the parties, or their representatives to mediate or conciliate the issues in the proceedings.

2. The chairperson may designate a member or members of the agency, or a person or persons, to preside at a mediation or conciliation conference.

3. At the conclusion of the conference the presiding member or person may prepare a report setting out the results of the conference for confirmation, interim confirmation or rejection by the agency.

---

[2] (s. 31 of the Children's Law Reform Act, s. 9(1) of the Divorce Act, and s. 3 of the Family Law Act).

4. Where an agency rejects a report the presiding members or person shall reconvene the parties.

5. Where an agency or a party rejects a report, the report shall not be disclosed and shall not form part of the record of proceedings.

6. Where an agency confirms a report, the agency may make an interim or final order.

7. An agency may give interim confirmation to a proposed report where the agency has determined that in the public interest, public hearings should be held with respect to the proposed report.

8. At the conclusion of the public hearings, the agency may confirm or reject the report or make such other decision respecting the proceedings as seems just to the agency.

9. The members presiding at a mediation or conciliation conference shall not participate in any hearings of the proceedings by the agency.

## USE OF PRE-FILED EVIDENCE

### 1. Background

The complexity of Environmental Assessment hearings and the detailed documents upon which they are based have led to some very long hearings.

Often many of the matters raised in the environmental assessment documents are adequately dealt with in the documents so that they do not become contentious matters at the hearing. Until now, however, the proponent has been obliged to introduce the environmental assessment documents and has often felt it necessary to call witnesses to give evidence with respect to all matters described therein.

Because witnesses are examined on all the evidence contained in the environmental assessment documents, counsel for opposing parties often feel obliged to cross-examine (perhaps to assure their clients that no stone is being left unturned) even though counsel may recognize that the issues are not crucial to the determination of the matter.

Where the Board feels that too much time has been taken on matters not in dispute it may penalize a party by means of its costs powers. This is a cumbersome way to deal with the surfeit of information that accompanies environmental assessments and is often not productive in dealing with the information at a hearing on a daily basis.

### 2. The Proposal

Environmental assessment documents and the appropriate supporting documents would be filed with the Board and all parties well in advance of the hearing. The written material would also be made available to the public in appropriate locations and the public would be properly notified of their availability.

The proponent would advise the Board, other parties and the public of those matters within the environmental assessment which are included in the documents for the sake of completeness, as required by the EAA, but which, in its view, are not contentious by virtue of the supporting reports or communications with other parties.

At a preliminary hearing, or by written communication prior to the hearing, other parties or the public would draw to the Board's attention those areas for which they would not accept the pre-filed evidence "as read" rather than viva voce at the hearing. Such objections would have to be supported with clear statements identifying the issues in dispute and the objectors would be reminded of the costs powers associated with the legislation.

Assuming that some of the evidence will be accepted "as read", the Board would then advise all parties at the outset of the hearing about matters for which it may not admit oral evidence. At the same time the Board would advise all parties that it had read the evidence so that such evidence could be used, if appropriate, in the reasons for decision.

This initiative in streamlining the process would logically be linked to other initiatives with respect to costs powers and scoping exercises.

## 3. Possible Amendments to Legislation or the Board's Rules

a) Statutory Powers Procedure Act

Subsection 1(b) allows a tribunal to admit as evidence at a hearing, whether or not given or proven under oath or affirmation, any document or other thing and subsection 16(a) says that a tribunal may, in making its decision, take notice of facts that may be judicially noticed. It appears that amendments may not be required here.

b) Environmental Assessment Act

Subsection 11(4) allows reports submitted to the Minister to be incorporated as part of the environmental assessment. Section 12 could be amended to specifically allow pre-filed evidence at a hearing by adding an additional subsection (5).

c) Consolidated Hearings Act

Subsection 7(3) allows a Joint Board to determine its own practice and procedure. Notwithstanding ss. 7(3) it would be clearer if ss. 12(3) were amended to read:

> "No member of a Joint Board shall participate in a decision of the Joint Board following upon a Joint Board hearing unless he was present throughout the Joint Board hearing, had read any pre-filed evidence accepted "as read" and heard the evidence and argument of the parties.

d) Environmental Assessment Board Rules

Subsection 46(1) now allows any person to file with the Board a written submission, but that rule was not intended to cover the pre-filed evidence application. A new section 39 to cover this specific situation would be appropriate.

## MOTIONS FOR 'NON-SUIT'/EARLY DISMISSAL OF APPLICATIONS

### 1. Background

Motions for "non-suit" should more properly be called motions for early dismissal of the application. The concept of "non-suit" comes from civil procedure. In civil actions, the plaintiff presents all of its evidence prior to the defendant's evidence, and has the burden of proving its case. If, after hearing all of the plaintiff's evidence, the defendant believes the plaintiff has not proved its case, it can move to have the plaintiff's suit dismissed. In Environmental Assessment Board and Joint Board hearings, however, it is not always the case that the proponent calls all of its evidence before there is evidence from the intervenors (for the purposes of this discussion, any party other than the proponent); increasingly, hearings are phased, that is, the evidence is presented by all parties according to subject matter.

Whether the hearing proceeds in the traditional fashion or is phased, there will occasionally be an opportunity for an intervenor to say that, having heard all or part of the proponent's evidence, or all or part of the evidence on a particular subject, the proponent has not proved an essential element of its case or an element has been established which is fatal to the application. The intervenor will argue that regardless of whatever other evidence may be called by the intervenors in a traditional hearing, or by the parties on other subjects in a phased hearing, the proponent can not possibly succeed in its application.

The ability of the Environmental Assessment Board or a Joint Board to dismiss an application early is desirable. If the hearing board is satisfied that an essential element of a successful application has not been established, such that the application cannot possibly succeed, it makes little sense to continue the hearing.

It is often the position of those responding to such motions that the hearing board, whether an Environmental Assessment Board panel or a Joint Board panel, does not have the jurisdiction to make such an order, and that it is required to hear either the applicant's/proponent's entire case or all of evidence of all parties before making a decision. They often rely on section 10 of the SPPA, which provides that a party to proceedings may call and examine witnesses.

## 2. The Proposal

The Environmental Assessment Board believes it has the jurisdiction to dismiss an application early (and it has exercised it in a number of cases). To remove any doubt, however, the legislation should be amended to make it clear that the Environmental Assessment Board and Joint Boards have the power to dismiss applications early where they are satisfied that, regardless of what the rest of the proponent's case may reveal, the application is deficient or defective and cannot possibly succeed.

## 3. Possible Amendments to Legislation or the Board's Rules

Section 10 of the SPPA could be amended as follows:

(2) Nothing in this section prevents a tribunal from dismissing an application prior to hearing all of evidence proposed to be adduced, if it is persuaded that the application cannot succeed.

## ALTERNATIVES MEANS OF EXAMINATION OF EXPERT EVIDENCE

### 1. Background

Certain areas of expert testimony are very detailed and complex. After several weeks of such evidence counsel and the Board will have become quite familiar with the terminology and methodology of the area of expertise.

In the normal course of events the proponent would call the evidence on its entire case before opponents begin calling their evidence. In a long hearing, months or years might pass between the first evidence on hydrogeology, for example, and the last such evidence. Board members, the parties and the public would then have to refresh their memories with respect to the subject matter.

One way of dealing with the problem is by phasing the hearing so that all evidence on one topic would be heard in the same time period. Experts from all sides would then be present at the same time and could make the evidence more comprehensible to the Board.

Unfortunately, the need to inform the Board fully is sometimes at odds with counsel's role of advancing his/her client's interests, and experts are kept from making the fullest disclosures that would enable the Board to arrive at the most reasoned decision in light of a vigorous exchange of views among the experts.

One suggested solution to this blockage of information has been to have the experts meet at the pre-hearing stage without counsel to work out areas of agreement and dispute so that all parties and the Board may focus only on outstanding differences. Such an approach may be helpful but is not the focus of this proposal, although it can be considered as a supporting measure.

### 2. The Proposal

Witnesses on all sides of an issue in dispute would be called to testify together before the Board with minimal intervention by counsel.

The Board would invite the witnesses for the proponent to explain their expertise, their studies, assumptions and findings with respect to the likely impact of the proponent's undertaking on the environment.

Similarly, witnesses for the other parties would describe in turn the impacts they expect to be associated with the undertaking. They would also describe the areas of evidence already given with which they do not agree. The Board would freely question the witnesses throughout this exchange.

The witnesses for the proponent would then be given an opportunity to reply to any issues raised by the experts for opponents and not already discussed. Opponents' witnesses would be allowed the same opportunity with regard to any issues that arose in the reply of the proponent's experts.

The Board members would then ask any final questions of the witnesses and allow counsel to explore certain areas by way of cross-examination.

## 3. Possible Amendments to Legislation or the Board's Rules

### a) Statutory Powers Procedure Act

Subsection 10(c) gives parties the right to cross-examine witnesses as necessary for a full and fair disclosure of the facts in relation to which witnesses have given evidence. The interplay between witnesses and the Board might be taken as limiting this right. To be clear, a new section, to follow section 10, should spell out the specifics of procedures intended to provide the fullest disclosure of the facts under the guidance of the Board, with the right of counsel to cross-examine on areas where full and fair disclosure may not have been achieved.

### b) Consolidated Hearings Act

Although subsection 7(3) allows a Joint Board to determine its own practice and procedure, this provision may be weak for the kind of approach envisioned here and may well have to be expanded to accommodate the hearing of witnesses for all parties on a given area of expertise at the same time.

c) Environmental Assessment Board Rules

Rule 36(1) could be interpreted as allowing witnesses from more than one party to sit as a witness panel, but a new section 36(4) could be added for clarity:

> "The Board may require evidence to be given by a number of witnesses representing all parties on a given area of expertise when the Board is satisfied that in the particular case the tendering of evidence in this manner will result in a full and fair hearing in the public interest."

## IMPOSITION OF TIME LIMITS FOR THE PRESENTATION OF ORAL EVIDENCE

### 1. Background

Oral evidence-in-chief is most useful to Board members hearing a case when the focus of examination is on clarifying complicated technical and scientific evidence, highlighting potential areas of dispute discerned through the interrogatory process or by other means of issue identification, and putting whatever emphasis on its use that the party leading the evidence wishes to make to the Board. Oral evidence-in-chief is not helpful to the Board when it is essentially repetitive of the written information already submitted to the Board, usually far enough in advance of oral examination that the Board has thoroughly digested its contents. It is in respect to this latter situation that the Board would see benefit in limiting oral examination. At long hearings where the evidence of each party is presented as a series of discrete topics, commonly as separate witness panels, the amount of time taken by a single party to lead oral evidence-in-chief can amount to as much as four or five days for one witness panel. Multiply this situation by numerous parties participating in a hearing and it is clear that considerable time can be devoted to oral examination that is not always tightly structured or highly informative.

Although not directly comparable to the Environmental Assessment Board proceedings, it is interesting to note that the Court of Appeal has controlled the length of time taken by lawyers in oral argument on applications for leave to appeal by means of a Practice Direction issued December 21, 1984: 15 minutes to the applicant, 10 to the respondent.

### 2. The Proposal

The Board could set time limits on the presentation of oral evidence-in-chief. Such limits could vary from a few hours to one or two days. Consideration should be given to limitations set on the total amount of time taken in oral examination. Otherwise the hearing may be prolonged by the addition of witness panels to circumvent time limits applying to individual panels or witness statements.

If limits on oral examination are to be instituted successfully, they must take effect at the outset of the hearing and, if possible, voluntary agreement to accept such restrictions should be obtained. To institute limits on oral examination after the hearing begins will inevitably result in the situation where one or more parties have the advantage of

leading evidence in an unstructured fashion and the parties to follow will complain that they are being treated in a different and therefore unfair manner.

Voluntary compliance by all the parties to time limits is the best solution to dealing with the disadvantages parties generally perceive occurring to limitations on oral examination. Counsel protect what they see to be their right under section 10 of the SPPA to call and examine witnesses in the manner the party thinks is necessary to present its case properly and fully.

Recognizing the onus is on the proponent to justify its application, the proponent will be most strongly opposed to any possible prejudice in the presentation of its case. The proponent will have numerous concerns, including:

- the amount of time to prepare written evidence will be greatly expanded because the witness statements will require crossing every "t" and dotting every "i" in order to convey precise meaning to the Board;

- expediting the evidence-in-chief could require expansion of -examination, thereby eliminating any time saved;

- the opportunity will be lost to have its witnesses' credibility and knowledge fully demonstrated;

- limiting oral examination will be done at the expense of greater clarification of complicated evidence; and finally,

- proponents perceive difficulty in predicting what will be the cross-examination of their witnesses and see the oral exposition of these issues as the most important role of oral examination.

Although the proponent may be uneasy about such restrictions, the advantages to be gained from time limits on oral examination are considerable. Condensing evidence presented orally puts the emphasis on good organization of clearly explained, succinct written evidence with highlighted summaries and conclusions that can be readily understood by the Board. Equally important is that well prepared written evidence provides a better basis for the cross-examination by parties and leads to an overall

shortening of the hearing. Parties with small resources are unable to participate fully in hearings that continue for two or three years; therefore they benefit directly from measures that expedite the process. The proposal for time limits on oral examination should consider specific exemptions for parties who are not represented by counsel, who communicate primarily in an oral tradition, who have limited resources to produce in-depth written witness statements and who rely on the evidence of "lay" witnesses rather than experts.

### 3. Possible Amendments to Legislation or the Board's Rules

Macaulay suggests that the following provisions be added to the SPPA:

(i) Where an agency conducts a hearing, evidence, submissions and arguments may be given in either oral or written form, or in mixed oral and written form.

(ii) Where an agency conducts a pre-hearing conference, a mediation and conciliation or settlement conference, evidence, submissions and arguments may be given in either oral or written form or in mixed oral and written form.

(iii) Despite section 10 [of the existing SPPA], an agency may, by order, restrict or limit the right of a party to call witnesses and to cross-examine witnesses.

(iv) Before an agency makes an order under subsection (iii), it shall give the parties an opportunity to make submissions respecting such an order.

The Board's Rules would need to be changed to provide some guidance with respect to the implementation of (iii) and (iv) above.

## RELEGATION OF PROCEDURAL AND OTHER NON-EVIDENTIARY MATTERS TO CONSIDERATION OUTSIDE THE ACTUAL HEARING HOURS

### 1. Background

The expectation is that a relatively small proportion of hearing time will be for procedural discussion. The process assumes that procedures are necessary to facilitate hearing the evidence. In fact, a major purpose of preliminary hearings is to resolve procedures beforehand in order for the hearing to be devoted to the presentation of evidence.

The recent experience of the Environmental Assessment Board with multi-year hearings, however, suggests that such hearings can be unnecessarily extended by procedural discussions. With the ongoing Timber Management hearing (which we hope is an exceptional example), 178 days were required to put in the evidence for the proponent's case. A rough analysis of the transcript indicates the following approximate breakdown of various components of the hearing:

| | | |
|---|---|---|
| direction examination | - | 7,904 pages |
| cross examination | - | 16,878 pages |
| re-examination | - | 1,048 pages |
| *procedural matters | - | 5,000 pages |

In effect, discussion of major procedural issues during the proponent's case has added 30 days to the Timber Management hearing (i.e., 20 per cent of the hearing time to date).

The amount of time devoted to procedural discussions obviously depends on a number of factors including the contentious issues of the case, the number of parties, the non-routine aspects of the application and so forth. At the Halton Landfill hearing, completed in 194 days, it is estimated that fewer than 200 pages of the 50,000 page

---

* Excludes frequent daily interventions by the Board and parties on minor procedural issues and is, therefore, an underestimation.

transcript, or less than one per cent of the hearing time, was occupied by discussion of procedures.

The two tasks of hearing the evidence and settling procedural issues are both important but the latter usually requires only the attendance of the parties' legal counsel, who are interested and obliged to participate in such discussions. At the Timber Management hearing, witness panels are excused from the room and the parties' consultants and members of the public rarely stay to observe procedural discussions.

## 2. The Proposal

It is an efficient use of time to schedule non-evidentiary discussions at the conclusion of the hearing day, thereby not adding to the total number of days required to hear a case.

## 3. Possible Amendments to Legislation or the Board's Rules

None required.

## TIMING OF FAIRNESS CHALLENGES

### 1. Background

At various points in a hearing counsel may make known their dissatisfaction with procedural or evidentiary rulings, but not give an indication of the seriousness of their concern.

When the hearing has concluded and a decision has been rendered by the Board, the unsuccessful parties often appeal to Cabinet to have the decision overturned. If Cabinet upholds the decision, counsel for such parties then may apply to Divisional Court in an attempt to overturn the Board's decision on the basis that the rules of natural justice or "procedural fairness" have been breached. Judicial review applications may be made at any time, since neither the EAA nor the CHA sets any time limit for such applications, although such time restrictions are contemplated by the Judicial Review Procedure Act.

The proponent or other parties that have been successful are thus left in doubt, until the court (or courts, if appeals are launched) has ruled. Consequently months, if not years, will elapse after the Board's decision before parties are clear as to the final outcome.

### 2. The Proposal

It should be made clear in the legislation that if objections to the way in which the hearing is being conducted are of such significant concern that the party raising the issue feels that it is not getting a fair hearing, those objections should be raised during the hearing. The Board, after due consideration of the matter, would set out on the record its ruling on the motion raised by the party. If a party is convinced of the crucial nature of the matter and the Board has ruled against it, it could appeal the Board's decision immediately or within a specified time to Divisional Court, and be prepared to pay the associated costs of its action, if it is turned down. In most cases the Board would continue the hearing while the separate applications are being prepared and heard in Divisional Court.

At the end of the hearing the only ground for judicial review would be a manifest denial of natural justice based on the final decision of the hearing panel and not matters that

were raised during the hearing and should have been resolved at the time. Judicial review applications would have to be brought within 30 days from the release date of the Board's decision. Cabinet appeals might also be made applicable only to certain types of hearings or be available only in relation to specific criteria. Also, if Cabinet appeals are retained in some form, time limits for decisions might be imposed.

The question of whether the Board's decision would be stayed (held in abeyance) while a Court action was continuing should also be specifically addressed in the EAA and the CHA, even though it is addressed generally in the SPPA.

## 3. Possible Amendments to Legislation or the Board's Rules

### a) Consolidated Hearings Act and Environmental Assessment Act

The CHA and EAA would have to be amended to specify that matters raised during the hearing and dealt with by the Board at that time would not provide grounds for judicial review after the decision is released, if the matter were not pursued at the time the objection was ruled upon by the Board.

Any provisions restricting the time frame for judicial review and limiting Cabinet appeals should be included in these Acts.

In addition, the legislation should specify that a Board decision takes effect immediately after the disposition of any Cabinet appeal, but the Tribunal or Divisional Court may grant a stay until after the disposition of other legal proceedings.

### b) Environmental Assessment Board Rules

Subrules 23(6), (7) and (8) set out conditions with respect to motions before the Board. Assuming the appropriate changes are made to the above-noted legislation, then additional paragraphs should be added to Rule 23 for greater certainty.

## CONTEMPT POWERS

### 1. Background

Administrative tribunals do not have any direct contempt powers which could be used to either punish persons who show contempt for the process or to bar them from further proceedings of the particular panel or the tribunal as a whole. Macaulay deals with this question in his report. He refers to section 9(2) of the SPPA which allows a tribunal to give directions for the maintenance of order at a hearing and to call upon a peace officer to enforce an order or direction. He also refers to section 13, which allows the Board to state a case to the Divisional Court in order that the Court might punish or take steps to punish the person as if he/she had been found guilty of contempt of Court. This power may be used if a person summoned as a witness does not attend, if a person who is to give evidence refuses to take an oath or make an affirmation or produce a document or anything else which might have been characterized as a contempt of Court. This power to state a case to Divisional Court is cumbersome and almost useless because of the time involved and the lack of the ability to deal with the matter as it arises.

Section 71 of the Courts of Justice Act provides for fines or imprisonment for contempt. Macaulay has drafted a section which is broader than the Court contempt powers and which includes the power to impose restrictions on the continued participation of a person in proceedings before a Board.

The problem of the troublesome litigator is dealt with in s.150 of the CIA. An order can be made barring him permanently from the process except by leave of a Judge.

### 2. The Proposal

Each tribunal should have direct contempt powers relating at least to participation in its proceedings. Other punishments may also be necessary but are not as important to the carrying out of the Board's functions, given that some powers already exist in the SPPA.

## 3. Possible Amendments to Legislation or the Board's Rules

a) Statutory Powers Procedure Act

The following is the portion (slightly adapted) of Macaulay's suggested amendment to the SPPA relating to continued participation in an agency's proceedings:

CONTEMPT

I An agency may make such orders or give such directions in proceedings as it considers necessary to prevent abuse of its process.

II An agency may:

(i) impose restrictions on the continued participation of a person in proceedings and may exclude a person from further participation in proceedings before the agency until the agency otherwise orders;

(ii) order a person to pay expenses incurred by the agency in connection with the contempt.

III Except where in the opinion of the agency it is necessary to deal with the contempt immediately for the preservation of order and control in the hearing room, the agency shall adjourn the contempt proceedings to another day.

IV An order of contempt made under this section may be appealed to the Divisional Court with leave of that Court.

V An agency may appear by counsel on an application for leave and on an appeal under section IV and is entitled as of right to be heard on an application and an appeal under this section.

VI An agency and its members and employees shall not be liable for court costs incurred in an appeal under this section.

VII An appeal from an order of contempt to the Divisional Court does not operate as a stay in the matter except where the Court otherwise orders.

## USE OF BOARD COUNSEL AND/OR TECHNICAL STAFF AND DEFINITION OF THEIR ROLES

### 1. Background

The traditional attitude of administrative tribunals towards "expert staff" appears to be based on a strict adherence to the common law principle that "he who hears must decide".

It is assumed that Board members are appointed because they have some expertise (i.e. legal, planning or environmental experience) that will enable them to assess the evidence and make decisions unassisted by anyone other than the other members hearing the case.

There also seems to be an assumption that the use of expert staff is to be avoided because their participation will introduce an "apprehension of bias" in the decision making process of the panel. The concern is that consultation among Board members generally, and the involvement of staff in the hearing process, will result in a decision of the panel being successfully challenged in the courts.

Until very recently, this narrow legalistic view was reinforced by a Divisional Court decision known as the Consolidated Bathurst case in which it was held that an Ontario Labour Relations Board panel ought not to have presented a draft decision for discussion to the whole Board, including members who had not heard the evidence. This decision was reversed by the Court of Appeal and on March 15, 1990, the Supreme Court of Canada upheld the Court of Appe !. This development could be seen as an encouragement to the Environmental Asses nent Board to explore the benefits to its hearing process of consultation among Board members and staff.

The Macaulay Report offers sensible advice to tribunals such as the Environmental Assessment Board in ascertaining how to improve the efficiency of the hearing process while at the same time not offending the basic legal requirement that panel members make the decision.

The Environmental Assessment Board is one of 91 Ontario government agencies that make decisions and can be described as a regulatory or administrative agency. Macaulay reports that 25 per cent of regulatory agencies have their own counsel and 85 per cent have staff review prefiled material.

The Ontario Energy Board is the example of an agency that maximizes the use of its technical staff. The OEB has three types of technical staff who report to the Director of Finance and Administration. The public hearings staff (14 persons) perform a role similar to that of an intervenor (i.e. adversarial). The public hearings staff hire a variety of outside experts such as financial analysts if the issue is a corporate takeover; engineers if a gas facility is being planned; or economists if hydro-economic forecasting is required. Public hearings staff argue a position on the application, lead evidence and cross-examine witnesses. They are also involved in the preparation of notices.

A two person technical advisory staff was created last year; in effect, hived off from the public hearing group to avoid "apprehension of bias" concerns. The role of this group is to support Board members with research, analysis and briefings. They are involved in the deliberations of the Board and will draft decisions upon instruction from the Board, with the understanding that the decision is made by the Board. They are seen as being an "extension" of the hearing panel.

The Energy Returns Officers group is involved with statutory compliance.

In-house counsel do "solicitor type" work. Outside counsel are regularly retained by the public hearings staff.

In contrast, the National Energy Board also has staff with considerable expertise but they are not as involved in the hearings and are required to keep at "arms length" from the parties. They do, however, draft written decisions for the Board.

The situation at the Ontario Labour Relations Board is again unique to its circumstances. Reliance is put on the panel members' notes because there are no transcripts. The Vice-Chair writes the decision without staff participation, although articling students are sometimes used to research jurisprudence. Board counsel (three plus students) advise the Chair on matters of administration and procedure but are not present in the hearing room. The OLRB employs 20 Labour Relations Officers whose role is facilitating settlement before the cases reach the hearing stage.

At the Workers' Compensation Appeals Tribunal there is a three person Office of the Counsel to the Chairman. These lawyers may be requested by the Chair to review draft written decisions for errors and policy consistency. They are also called upon to research legal matters. At the pre-hearing stage, medical assessors are consulted about applicants' health information in preparation for the hearing. The Tribunal Council

Office (10 lawyers and 10 legal workers) does prehearing "workup" involving the compilation of brief summaries of appeals for the panel.

## 2. The Proposal

This brief overview of the function of staff at other Boards indicates that the Environmental Assessment Board can certainly consider retaining expert staff. The first purpose of such staff would be to expedite the hearing process and to improve the quality of the panel's written decisions. Caution should be taken to avoid developing a bureaucracy of in-house experts beyond the minimum number required to fulfill these objectives.

What sort of staff is needed and what would their roles entail? The following are examples of staff positions that merit discussion as a starting point.

(a) A "case manager" as Macaulay describes the position. An expert who would essentially work with the parties at the preliminary hearings to establish, for example, procedures for delivery of witness statements, the scheduling of evidence, and the narrowing of issues (i.e., scoping).

(b) A "liaison officer" who would work with "unrepresented" parties to assist in developing their submissions to the panel and in encouraging and facilitating their participation at the hearing.

(c) A "editor" to assist panel members in improving the quality of their decisions and in producing faster written decisions.

(d) A "librarian" to carry out the data management and computer work required in long, complicated hearings lasting several years and with tens of thousands of pages of transcripts.

(e) A "researcher" to prepare weekly draft summaries of the evidence for panel members to discuss and revise as appropriate to their needs and to assist in organizing the background information for the written decision under the instructions of the panel.

(f) Legal counsel to the panel, identified at the outset of the hearing, with whom parties are encouraged to work in resolving procedural disputes outside the hearing and in mediating other matters that may not need to come before the Board.

## 3. Possible Amendments to Legislation or the Board's Rules

Macaulay proposes the following amendments to the SPPA with respect to consultation by agency members:

1. In making an interim or final order, and in preparing written reasons therefor, an agency member or panel may:

   (a) consult with other members of the agency;

   (b) consult with editors and agency employees with respect to technical, scientific and drafting issues; and,

   (c) circulate draft reasons to other members of the agency;

2. Notwithstanding the provisions of the Ombudsman Act and the Freedom of Information and Protection of Privacy Act the notes, working papers and draft decisions and orders of an agency and members of an agency are privileged.

3. Reports, documents, and other information and material supplied to an agency on a confidential basis are privileged for the purposes of the Ombudsman Act and the Freedom of Information and Protection of Privacy Act.

4. Where a panel member consults with other agency members, editors and staff, or where draft orders or reasons are circulated, and new arguments or facts, likely to affect the order or decision, arise, the panel shall apprise the parties of the nature of the new arguments and facts and give the parties an opportunity to make submissions.

## USE OF COSTS POWERS AS A PENALTY

### 1. Background

Generally, costs in Environmental Assessment Board hearings are awarded to compensate a party in respect of the party's involvement in the hearing. A hearing panel can however use its costs powers to punish, and this can be done in two ways:

1. The hearing panel may deny costs to a party seeking costs.

2. The hearing panel may order a party, other than the party that usually is the subject of a costs order (that is, the proponent or applicant), to pay costs.

The second is obviously a more drastic order.

The Boards' (Environmental Assessment Board and Joint Boards) costs powers under the applicable legislation are quite broad:

Environmental Assessment Act

s.18(16a) The Board may award the costs of a proceeding before it.

(16b) The Board may order to whom and by whom the costs are to be paid.

(16d) In awarding cost, the Board is not limited to the consideration that govern awards of costs in any court.

Consolidated Hearings Act

s.7(4) A Joint Board may award the costs of a proceeding before the Joint Board.

(5) A Joint Board that awards costs may order by whom and to whom the costs are to be paid.

(7) In awarding costs, a Joint Board is not limited to the considerations that govern awards of costs in any court.

The value of using costs powers as a penalty is that it assists the hearing panel in the control of the proceedings. The length of hearings is of real concern to the Environmental Assessment Board and others. Hearings are sometimes prolonged by examination and evidence that in retrospect appears to have been irrelevant. The Environmental Assessment Board as an entity, various Environmental Assessment Board panels, and Joint Boards have, in attempts to streamline the proceedings, implemented rules and issued procedural directions aimed at timely disclosure and focusing on the real issues in dispute.

The means the hearing panel has, other than through its costs powers, to ensure that its orders are adhered to and that the hearing proceeds expeditiously, are somewhat limited.

One possibility for reform is to adapt the Offer to Settle procedure in Rule 49 of the civil rules of procedure to various stages of our process as outlined in papers 1 to 3. Proposals recommended by a party would be set out in the written offer and served upon all parties. Its contents would be brought to the Board's attention only after a decision had been made and the issue of costs was being considered. The offer of a party which accorded with the Board's decision would result in a costs order against the parties who refused to accept that offer. The parties would be encouraged to use the Offers to Settle process as failure to have submitted an offer might also result in a denial of an award of costs to that party.

One of the practical problems associated with the use of costs powers as a penalty is that often the conduct that the hearing panel finds objectionable is that of the party's counsel, and not the party itself. It is not clear that the Environmental Assessment Board or a Joint Board has the jurisdiction to order costs against counsel.

## 2. The Proposal

In civil actions, the Court has express power to make an order of costs personally against counsel, "where a solicitor for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default...".

It is submitted that the Environmental Assessment Board and Joint Boards should have similar costs provisions. It goes without saying that such powers would be exercised sparingly.

The Environmental Assessment Board and Joint Boards should also have procedures in their rules implementing a process analogous to the Offer to Settle rules.

Also, as noted above, costs may be imposed if an Offer to Settle is not accepted.

## 3. Possible Amendments to Legislation or to the Board's Rules

Addition provisions similar to those in the Rules of Civil Procedure might be added to s.18 of the EAA and s.7 of the CHA. The Board's Rules should be similarly amended to provide more detail with respect to the criteria for costs.